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The Rule of Law and the Law-Based State (*Rechtsstaat*)

(with special reference to developments in the Soviet Union)

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The expression "law-based state" (in German, *Rechtsstaat*; in Russian, *pravovoe gosudarstvo*), which since 1988 has been one of the principal slogans of the Gorbachev Administration, is often mistranslated in English as "rule of law" or "state based on the rule of law."[1] In this essay I shall explore the theoretical implications of the expressions "rule of law" and "law-based state" in the context of their historical origins and shall examine ways in which both concepts are reflected in recent Soviet legal thought.

Prior to the accession of Gorbachev, the concept of a law-based state, which had been hotly debated by pre-revolutionary Russian writers (who themselves had derived it from nineteenth-century German jurists), was uniformly denounced in published Soviet political and legal literature. In theory, it conflicted with the Marxist-Leninist doctrine that law in all societies is a reflection of the will of the ruling class and that the state is ultimately bound by that will and not by any laws. In practice, it conflicted with the ultimate supremacy of the Communist Party leadership over the state itself. Only at the Nineteenth Party Conference in 1988 was *pravovoe gosudarstvo* added to *perestroika*, *glasnost*, and *demokratizatsiia* as a fundamental dimension of the new thinking called for by the Soviet leadership.

In numerous subsequent discussions of the theoretical and practical meanings of the concept of a law-based state, Soviet jurists have, for the first time since 1917, expressly linked themselves with a tradition of political and legal thought that goes back to Plato and Aristotle and Cicero, on the one hand, and to Locke and Kant, on the other. Pre-revolutionary Russian and German writings on *pravovoe gosudarstvo* or *Rechtsstaat* have also been referred to with respect. Nevertheless, despite occasional nods in the direction of a theory of natural law, Soviet jurists have thus far generally ignored, or else rejected, the concept of a law that is higher than, or even separate from, the laws that have been promulgated or acknowledged by the state.

In the Western legal tradition, the concept of a law that is higher than the state goes back to theories of divine law and natural law that were first systematically expounded in the twelfth century, and were resorted to in disputes between subjects of ecclesiastical law, between subjects of ecclesiastical and subjects of secular law, and between subjects of secular (royal, feudal, urban, and mercantile) law themselves. Indeed, the competition of jurisdictions between ecclesiastical and secular authorities and among secular authorities in the same territory was a powerful source of the search for a source of law higher than that

of any political sovereign.[2] The scholastic theologians and canon lawyers were the first to use the expression "positive law" (*jus positivum*), referring to law that is laid down ("posited") by the lawmaker, as distinct from divine law (*jus divinum*), derived from the Ten Commandments and other sources of divine revelation, on the one hand, and natural law (*jus naturale*), whose source is human nature, and especially human reason and conscience, on the other.[3] In the sixteenth and seventeenth centuries, however, due partly to the subordination of the church to royal domination, the belief in a source of law superior to the will of the ruler was for the first time seriously challenged. It was not denied that there existed both a divine law and a natural law to which the supreme ruler of the state *ought* to submit his will, but new philosophical and scientific concepts made a sharp distinction, in law as in other spheres, between the "ought" and the "is," and at the same time (and perhaps in connection therewith) a new political theory of sovereignty denied to anyone the right to challenge on grounds of the law that "is" any law or command of a sovereign ruler. Thus divine law and natural law were removed from the realm of existing law to the realm of morality, leaving as the only prevailing law, the only legally binding law, the positive law of the state. It was partly against sixteenth and seventeenth century concepts of the absolute sovereignty of the monarch that the seventeenth-century English and the eighteenth-century American and French Revolutions were fought.

Paradoxically, perhaps the earliest published use of the English expression "rule of law" — in the sense of reign of law, or supremacy of law — was by King Charles I, who in 1649 was tried and condemned to death for treason by a special tribunal established solely for that purpose by the Puritan Parliament. Charles contended in his own defense that Parliament had no legal authority to try him and that the proceedings violated "the fundamental laws of the land." He charged that under the Puritan regime "power reigns without rule of law, changing the whole frame of that government under which this kingdom hath flourished."[4]

In more recent times it was the English legal scholar and statesman A. V. Dicey who brought the phrase "rule of law" into widespread use in England and America through his analysis of it in his book *Introduction to the Study of the Law of the Constitution*, first published in 1885.[5] For Lord Dicey the rule of law meant that certain basic principles of justice may not lawfully be infringed even by the highest lawmaking authority. Like King Charles I, he found the source of those basic legal principles in the fundamental laws of the land or, more precisely, in the English Constitution, which, though called unwritten, is embodied in historical monuments such as the Magna Carta of 1215, the Petition of Right of 1628, the Habeas Corpus Act of 1677, and above all the Bill of Rights of 1689, in the historically evolving English common law. In sharp contrast, however, to the conception of the early Stuart monarchs, the basic principles of the English Constitution identified by Lord Dicey include, on the one hand, the sovereignty of Parliament and, on the other hand, certain inviolable rights of the subject such as the right to a fair hearing, equality before the law regardless of rank or condition, the right not to be deprived of one's life, liberty, or property without due process of law (in the procedural sense of that phrase), and also certain political rights such as freedom of discussion and the right to hold public meetings. In the English conception, Parliament itself, although supreme over every other political agency, is nevertheless considered to be constitutionally bound by fundamental principles of justice embodied in the historical traditions of the English people.[6]

The phrase "rule of law" came to be used in the United States in a different sense. Americans added to the English emphasis on the historical foundations of legality an emphasis on its foundations in written federal and state constitutions that proclaimed such civil liberties as freedom of religion, speech, press, and assembly. Moreover, the American concept of due process of law, embodied in the Fifth and Fourteenth Amendments of the United States Constitution, came to include not only procedural but also substantive justice. In addition, the Americans, unlike their British cousins, introduced a governmental system of checks and balances, entrusting to the judicial branch of government (rather than to Parliament) supreme authority to guard the Constitution. This added a new dimension to the concept of the rule of law, since it meant that in appropriate cases it can be invoked against the legislature itself by any citizen in any court. New words, "constitutionalism" and "constitutionality," were invented in the United States to embody these various principles.

The underlying philosophy of American constitutionalism rests not only on a historical jurisprudence, as in England, but also on an implicit theory of natural law. It is presupposed that certain kinds of moral principles, rooted in reason and conscience, have binding legal force. Their basic terms are expressed, to be sure, in written form in a legal document, the Constitution, and thus they are embodied in positive law, but they are ultimately derived (in the words of the Declaration of Independence) from "Nature and Nature's God," and their meaning transcends their written form. This means that they can be consciously and deliberately adapted by the courts to new situations from generation to generation.

In the French Revolution, the attack upon arbitrary rule by the monarchy and oppressive and unjust privileges of the aristocracy was made principally in the name of "the rights of man and citizen," which were to be protected by a strict separation of legislative, executive, and judicial powers.[7] Although the first written constitution of 1791 contained a list of the "natural rights" of the individual, and declared that the legislature had no legal power to interfere with their exercise[8], nevertheless there was no appeal to an ancient historical tradition, such as was made in England, to bind the legislative branch nor was the judiciary given the power, as in the United States, to annul legislative acts. Thus in the French conception the ultimate source of law is the legislature, and the only external control on the legislature's lawmaking power is the political control of the electorate. The executive and the judicial branches are not supposed to check or balance the legislative branch, but rather to execute and apply, respectively, the enacted laws.[9] The French state is considered to be ultimately responsible not to a higher law but rather to the public opinion of the nation.

In jurisprudential terms, this reflects a positivist theory, according to which law (*droit*, *Recht*, *pravo*) consists of a body of legal norms or rules (*lois*, *Gesetze*, *zakony*) enacted (or acknowledged) by the state and enforced by coercive sanctions. There is nothing in the French constitution that permits the laws enacted by the National Assembly in the name of the people of France to be challenged in the name of some higher legal authority, whether derived from history or from morality. The natural rights of the individual person inhere, to be sure, in human nature and human reason, but these do not constitute or themselves produce a natural law that can overrule the will of the legislature.

The term *Rechtsstaat*, which was introduced into German legal and political thought in the early nineteenth century, also reflected a positivist jurisprudence. Although the term came to be used in various senses, its original proponents identified law with the state.[10] *Rechtsstaat* meant that not the nation, the *Volk*, in its historical development, and not natural reason and conscience, but the will of the supreme political authority, the will of the lawmaker, was both the ultimate source and the ultimate sanction of the law.[11] Nevertheless, the supreme political authority was to be law-based; the state was to constitute a "law-state," and not a state ruled by the arbitrary will of an absolute monarch as in earlier centuries. Nor was it to be a *Polizeistaat* — a "policy" or "welfare" state ruled by a benevolent autocrat.[12] The *Rechtsstaat* was to govern by law and was to be bound by, and not absolved from, the law which it makes. It was not to apply its law inconsistently or otherwise abuse it. This concept of the *Rechtsstaat* influenced, though it did not dominate, not only German but also Russian legal and political thought in the nineteenth and early twentieth centuries.[13]

The concept of *Rechtsstaat*, or *pravovoe gosudarstvo*, is consistent, at least, with the assumption that the state itself is the highest, if not the only, source of the law through which it operates. *Rechtsstaat*, or *pravovoe gosudarstvo*, is rule *by* law, not rule *of* law; it does not presuppose a fundamental law which is derived from a source outside the state and which the state is legally powerless to change. Theoretically, a fascist or other dictatorial regime can constitute a *Rechtsstaat*. Indeed, under German national socialism jurists defended the sentencing of persons to concentration camps on the ground that the German state was a *Rechtsstaat*.[14]

It is characteristic of the *Rechtsstaat* that it considers the basic form and source of law to be legislation, rather than custom and precedent (as in historical jurisprudence) or equity (as in natural-law theory). Custom, precedent, and equity are assimilated, in the positivist theory, to legislation; what makes them *law* is that they are accepted by the legislative authority and are enforced by state sanctions. It is therefore characteristic of the strong positivist tendency of legal thought in nineteenth-century Europe that it fostered the embodiment of the law of the state in a coherent and complete legislative codification of its various branches. To the extent that the entire legal order of the state is embodied in legislative enactments, law in the large sense (*Recht*, *droit*, *pravo*, *jus*) is identified with law in the narrower sense of a specific legal rule (*gesetz*, *loi*, *zakon*, *lex*), and the *Rechtsstaat* may be viewed as a *Gesetzesstaat*, that is, a state that rules by *laws*. This, indeed, is what *pravovoe gosudarstvo* meant when it was first proclaimed as a slogan of the Gorbachev Administration. In accordance with the extreme form of positivism which had been officially endorsed in the Soviet Union, and which until now has dominated Soviet legal thought, the *pravovoe gosudarstvo* has been identified with the supremacy, or reign, of enacted law (*verkhovenstvo zakona*, *gospodstvo zakona*) rather than of law in the larger sense, law as a whole, implying right, or justice (*pravo*). Even Soviet writers who in recent years have moved away from a rigid positivism have identified the law-based state with the reign (*gospodstvo*), or rule (*pravlenie*), of *zakon* rather than of *pravo*.[15]

One should not minimize, however, especially in the context of Soviet history, the importance of the principle of the rule of *laws*, even though it falls short of the principle of the rule of *law*. It means, in the first place, that the state rules by laws and not by mere force or fiat. It means, secondly that the state is bound by its own laws, that is, it may not arbitrarily disregard them but may only

change them by the legal procedures which it has established for changing them. And thirdly, it means that hitherto all-powerful state executive and administrative agencies, including the Council (now renamed Cabinet) of Ministers and its subordinate ministries and departments, may not issue decrees or regulations which conflict with statutes enacted by the legislature, and that courts or other agencies may not enforce such decrees or regulations. Under Stalin, the Soviet state systematically violated its own laws, and under Stalin's successors it has done so frequently, though not systematically and not with Stalin's brutality. Also, both under Stalin and his successors many thousands of administrative regulations were issued that contradicted statutes promulgated by the union and republican supreme soviets, and these regulations, though illegal, were enforced by administrative authorities and by the courts as substatutory "legislation" (*zakonodatel'stvo*).[16]

An important modification of the conventional Soviet theory of law was made in an article published in 1988 in the Communist Party monthly journal *Kommunist*, in which two prominent jurists — one of them a vice-president of the USSR Academy of Sciences — gave a new dimension to the Soviet concept of the law-based state by tracing its origins to Plato, Aristotle, Cicero, Montesquieu, Locke, and Kant. Although still referring to the rule of *zakon*, rather than the rule of *pravo*, they quoted Plato as stating that only "where law (*zakon*) is master over the rulers and they are its slaves" is there "salvation of the state . . . ," and Aristotle as stating that "where the power of law (*zakon*) is absent, there is no place and no kind of form for the state order," and Cicero as asking "Yes, and what is a state other than a general legal order?" "The philosophical basis of the theory of the law-based state," they wrote, "was formulated by Kant, who viewed the state as 'an association of the multitude of people who are subject to legal rules' and who considered that the legislature should be governed by the requirement: 'what the people cannot decide for itself, the legislator cannot decide for the people.'"[17] The authors did not wholly abandon a positivist theory of law; on the contrary, they identified law with the state. On the other hand, they also proclaimed the validity of universal moral norms of human dignity and, in connection therewith, universal legal norms of procedural and substantive justice. Without using the expression "natural law," they invoked — for the first time, certainly, in the history of the journal *Kommunist* — the authority of classical exponents of natural-law theory. At the same time, they stressed the subordination of the state to society, and the dependence of legal institutions on the legal consciousness of the people — and not just society and the people in general, but Soviet society and the Soviet people, tracing in broad outline the "extremely painful and difficult process" by which legality became established in the historical development of the Soviet State from October 1917 to the present.[18] Thus they added to positivism not only an embryonic theory of natural law but also an embryonic historical jurisprudence.[19]

The distinction — and the tension — between a positivist theory of the relationship of law to the state and both a natural-law theory and a historical theory was put sharply in 1988 by V. F. Yakovlev, a leading Soviet legal scholar who subsequently became the USSR Minister of Justice, in the course of a round-table discussion among Soviet jurists concerning the meaning of a law-based state. "The specific question," he stated, "is: what over what? The state over the law or the law over the state?" Although he used the word *pravo* throughout, and not *zakon*, he answered the question in positivist terms: "Despite the fact that the law is born of the state, and has its sources in state institutions, the state nevertheless becomes truly law-based when it places the law above itself." Here it is postulated that there is no higher source of law than the state itself, which may, however, or may not, "place the law above itself."[20] In 1990, I had the opportunity to ask Minister Yakovlev, "If there is to be in the Soviet Union a law higher than the state, what will be the source of that law?" He replied, "As in the United States, it will be the Constitution — the spirit of the Constitution." When I asked, "Do you mean the spirit of the 1977 USSR Constitution?" he replied, "Well, there are some good things in that Constitution." Presumably, he hoped that a new USSR Constitution, then being planned, would add many more "good things."

The 1977 USSR Constitution does indeed proclaim certain fundamental principles of legality and certain fundamental rights of citizens. These principles and rights are presented, however, as commitments and grants made by the state. There is nothing in that Constitution that prohibits the state from retracting those commitments and rights. Amendments to the Constitution require only a two-thirds vote of the supreme legislative body. Moreover, the Constitution is not self-executing, that is, it is not directly applicable but must be implemented by legislation in order to become operative. This is obvious in those provisions which expressly provide that the powers of official agencies or the rights of citizens shall be exercised "in a procedure [to be] established by [statute] law." Even in the absence of such a limitation, the 1977 Constitution, like the 1936 Constitution before it, and like the fifteen republican constitutions that were adopted in imitation of them, is essentially a directive to the legislature to enact laws corresponding to its provisions. In the absence of such legislation, it has only occasionally happened that a court

or other state agency has directly applied a provision of the Constitution. Moreover, courts have no legal power, under the 1977 Constitution, to refuse to apply a statute on the ground that it violates a constitutional right.[21]

Yet even if all these limitations on the authority of the Constitution were removed, could it be said that it constitutes a body of law that is higher than the state itself, or could it only be said that the state which gave birth to the law had placed the law above itself — and could presumably at any time lawfully place itself above the law?

That the state is itself not only a creator but also a creature of law, that the state is born of the law and therefore has power to create new law only within the limits of the law which gave birth to it — were truths widely accepted in the West until the nineteenth and twentieth centuries. A group of persons armed with sufficient instruments of power may, indeed, subdue a large number of other persons and compel them to act in certain ways. No state comes into existence, however, unless it is postulated that the subduers have not only the power but also the right to govern their victims and that the victims have not only the necessity but also the duty to obey. Once the relation between ruler and ruled is conceived in terms of a correlative right and duty, then it becomes apparent that power (contrary not only to Marxian but also to current non-Marxian political theory) is not a unilateral but a bilateral relationship. Thus not only domination but also citizenship is involved in the establishment and maintenance of a state. Conversely, toward citizens a state has not only rights but also duties, and toward a state citizens have not only duties but also rights. It is the reciprocity of rights and duties, or law, not mere power, that constitutes a state in its internal relations. Similarly, it is law that determines its character as a state in its external relations. Indeed, in the Western political and legal tradition, a state is defined in the first instance by its membership in a legal association of states. As late as 1827 Chancellor Kent started his Commentaries on American Law with a chapter on the law of nations, implying at the outset that it is the law of nations which gives the United States the right to create a system of national law.[22]

That Soviet statesmen and jurists have begun to think in terms of a law that is higher than the state is apparent from a Draft Constitution of the Russian Federation, published in November 1990, which was to be submitted to the Supreme Soviet of the RSFSR.[23] The Draft Constitution proclaimed a law-based state, a *pravovoe gosudarstvo*, but it also proclaimed "the supremacy of law (*pravo*) and of the Constitution," stating that the state and all its agencies and officials are bound by law (*pravo*) and by the constitutional order," that "the Constitution of the Russian Federation is the highest law (*zakon*) of the Republic," and that "laws and other legal acts that contradict its provisions shall not have juridical force." It states that "a law (*zakon*) must be lawful (*pravovym*)," and that citizens "exercise their rights independently," that is, their rights are not grants from the state, although they may be restricted (within constitutional limits) by the state.

The 1990 Russian Federation Draft Constitution provided further that "norms of the Constitution shall have direct application." A court that is asked to apply a law which it considers to be unconstitutional was to suspend the proceeding and submit the matter to the consideration of a special Constitutional Court, which was to have the power and the duty to annul all laws, decrees, or other normative acts that violate the Constitution. It was expressly provided, moreover, that any decision or action of any state agency or official that violates the constitutional rights of citizens may be appealed to a regular court. Thus provision was made both for constitutional review of legislative acts and for judicial review of the constitutionality of official actions.[24]

The 1990 Russian Federation Draft also contained an extensive list of specific civil and political as well as social, economic and cultural rights. It prefaced the list with a general declaration that "man [*chelovek*, the person], his life, honor, dignity and freedom, personal inviolability, [and] his natural and inalienable rights constitute the supreme value," and further, that "human rights and liberties belong to a person from his birth," and that the enumeration of "the rights and liberties in the Constitution and in laws shall not be used to reduce other human rights and liberties." Thus a conception of natural rights was embodied in the Draft Constitution. This conception was reinforced by the provision that if an international treaty to which the Russian Federation is a party (which would include the Human Rights Covenants of the United Nations) contains rules that differ from those contained in legislation of the Russian Federation, then the rules of the international treaty shall be applied. Thus the state, bound by the Constitution not to infringe certain natural and inalienable rights, was also subjected by the Constitution to an overriding international obligation to protect those rights — an obligation that could only be avoided by a formal denunciation of the international treaties to which the state had previously adhered.

It is scarcely enough, of course, simply to proclaim various civil and political and social and economic and cultural rights to be natural and inviolable. It is necessary also to provide a machinery for protecting those rights against violation. The 1990 Russian Federation Draft Constitution took an important step in that direction by vesting in the judiciary the power and the duty to annul

any legislative or administrative act that conflicts with the Constitution and any official action that violates constitutional rights. Yet even judicial supremacy is not a complete guarantee, since in judging the constitutionality of legislative and administrative acts or official actions the judiciary must weigh against the protection of the rights of citizens the legitimate interest of society in the protection of public order as well as various other public interests that are also proclaimed in the Constitution. In the spirit of the eighteenth-century Enlightenment, the Draft Constitution seeks to establish a self-regulating legal order within the state structure by combining the (French) concept of the separation of powers with the (American) concept of checks and balances and a strong presidency, and by providing for a multi-party political system with democratic elections of the parliament and of the president. Yet it provides no opening for a challenge on legal grounds to a norm that has been approved by *all three* branches of government, even though the norm violates what in England would be called the fundamental law of the land and in America due process of law. Thus the state has agreed to be bound by a law which, to be sure, it has proclaimed to be higher than itself but of which in fact it is itself the creator, not the creature. The "natural rights" of man and citizen, though said to be inalienable, are nevertheless from a legal standpoint conceived to be a product of positive law.

The 1990 Russian Federation Draft Constitution does attempt, however, in one of its parts, to establish a source of law which is outside the Constitution itself and from which the Constitution itself is derived. That source is called "civil society," and one of the principal chapters of the Constitution is devoted to it. It proclaims (1) "the inalienable natural right to be an owner," the right of workers to form trade unions and conclude collective labor agreements, and the freedom of private persons and of associations to form business enterprises. It also proclaims (2) that "the family is a natural cell of the society," that children born out of wedlock shall have the same rights as children born of registered marriages and that parents shall be obliged to take care of their children and adult children of their parents. In addition, it proclaims (3) that culture and science, research, and teaching "shall be free," and that "pluralism in the intellectual and spiritual sphere is guaranteed;" (4) that "the mass media shall be free [and] censorship is prohibited;" (5) that "religion and religious associations shall be separate from the state" and that "the state may not give preference to any religion or to atheism;" and (6) that political parties and other voluntary public associations may be freely formed. Each of these six sub-sections of the chapter on a "civil society" is elaborated and qualified in various ways.

Here it must be noted that the term "civil society" has been widely invoked in recent years by proponents of fundamental change in Eastern Europe and the Soviet Union. The term itself first came into wide use in England in the seventeenth century to signify the political order as contrasted with a hypothetical state of nature.[25] In the late eighteenth and early nineteenth centuries, "civil society" acquired new meanings, first in France and then in Germany. In France *société civile* came to mean, both in the political sense and in the cultural sense, a society characterized by individual liberty and (to a lesser extent) equality and (to a still lesser extent) fraternity among the people who comprise it. It was related to the French concept of civilization. In German, the word "civil" is rendered as *buergerlich*, meaning "pertaining to the citizen," and in Russian, too, "civil society" is rendered *grazhdanskoe obshchestvo*, "citizens' society." The German *buergerliche Gesellschaft* and the Russian *grazhdanskoe obshchesto* have a strong link with citizenship, that is, with membership in the political order. Thus they are linked with the state, although they are separate from it. The French *société civile*, on the contrary, is sharply distinguished from the state. It is more like the nineteenth-century German concept of *Kultur* than like *buergerliche Gesellschaft*.[26]

Marx, following Hegel, identified civil society (*buergerliche Gesellschaft*) with relationships of civil law (*buergerliches Recht*), that is, the private law of property, contract, tort, inheritance, family relationships, and the like, as contrasted with the public law of state power and state administration. Marx, of course, in contrast to Hegel, viewed such "bourgeois" legal institutions as a mere facade for the protection of the interests of the ruling capitalist class, resulting in the exploitation of the proletariat, alienation of the worker from the means of production, and an economy based on the exchange of goods rather than production to meet needs, and he denounced "bourgeois society" for its ideology of individualism and self-aggrandizement. Under socialism, a classless society was to prevail, and individualism would be replaced by collectivism. A socialist society, therefore, could not be a "civil" society. Following this reasoning, Soviet Marxist-Leninists rejected the notion of a socialist civil society as a contradiction in terms. Instead, they used the single word "society" — as Marx did — to denote the entire range of socio-economic relationships, but nevertheless contrasted "society" with "the state," which, though it arose on the basis of society, would continue to stand over society as a necessary instrument of coercion until the final achievement of a classless society. In the post-Stalin era, the Communist

Party leadership proclaimed that the functions of the Soviet state were gradually to be assumed by the voluntary actions of society. Yet the truth was that the state, though it was, to be sure, slowly becoming more democratic, hardly yielded the substance of its power over the lives of the Soviet people.

The great Polish writer Czeslaw Milosz has said that "in the twentieth century, the state has eaten up all the substance of society."[27] In this perspective "society" means the primary associations in which a person acquires his character as a social being: family, church, school, neighborhood, workplace, business enterprises, professional organizations, literary societies,and other voluntary social and economic associations, that constitute a civilized people, a "culture." The decline of the vitality of these autonomous community relationships in the twentieth century has been closely connected with the enormous expansion of the central political authority of the state: each is a cause of the other.[28] It is a virtue of the 1990 Draft Constitution of the Russian Federation that under the heading of "civil society" it identifies and gives legal protection to a broad range of basic social activities and associations: individual and group property relations, labor relations, voluntary economic and other enterprises, marriage and the family, intellectual and spiritual activities, communications media, religious activities and religious organizations, political parties and other public associations. Also ethnic and linguistic communities are to be given autonomy.

If, indeed, the source of the law that defines the powers of the state, that is, the source of the law of the Constitution, is understood to be the entire community of individuals, voluntary associations, and autonomous groups that comprise a civilized people, then the Marxist doctrine that the state is a political superstructure built on an economic base, in which class relations of production play the decisive part, must be rejected. The whole of society, including its family units and its language, and not merely its social-economic component, forms the basic substructure. Moreover, if community relations as a whole, and not only class relations, define state power, then the Marxist doctrine that law proceeds only from the state must also be rejected, since society as a whole inevitably has a legal dimension, a built-in *unofficial* legality, and in addition the various types of associations and activities that make up a society have their own distinctive unofficial legal aspects. Thus in this version of a civil society the state is formed partly in response to the law that governs people in their social relations — identified as customary law by adherents of historical jurisprudence, and as natural law by adherents of a natural-law theory. In this concept, the process described by Czeslaw Milosz is to be reversed: civil society, including its legal dimension, is not only to be liberated from domination by the state but is itself to become dominant over — "higher than" — the state. State law, official law, is to be subject to social law, unofficial law, the law-consciousness of the civil society.

Consistent with this theory is the provision of the 1990 Russian Federation Draft Constitution that the fundamental principles identified in its first chapter may only be changed by a universal referendum. These include the inviolability of basic human rights, political and ideological pluralism, separation of powers, supremacy of law, a social market economy, a state based on social democracy, and a federal structure.

Nevertheless, the Draft Constitution does not go so far as expressly to identify the source — or sources — of a law that is higher, or other, than the state. Moreover, it does not indicate the difference, if any, between "civil society," to which it devotes forty-one separate articles, and just plain "society," without a preceding adjective, which is at various places juxtaposed with the state. Thus the Constitution is declared in the Preamble to be "the fundamental law of our society and our state," and "society and the state" are required under various articles "to protect" the interests of consumers, the family, and the cultural and intellectual heritage, "to secure" the development of basic scientific research, "to contribute to" the improvement of international relations in the sciences, culture, and education, and so forth. Finally, in declaring "the goals and tasks of the state," the Draft provides that the state "shall be the official representative of society, whose will it shall represent through its agencies and institutions." This assertion of the relationship between the state and society is undoubtedly intended to enjoin the state to be responsible to society and to represent its interests. Yet it postulates a unitary *political* order, a single "state," which alone may speak and act for society "officially," and also a unitary *social* order, a single "society," which is distinct from the "state" and is officially represented by it. Thus the theoretical possibility is left open that the state, to which "the people" has delegated a monopoly of lawmaking authority, may once again, in Milosz's image, eat up all the substance of society, albeit in a democratic fashion.

Taken as a whole, the 1990 Russian Federation Draft Constitution goes beyond the positivist concept of a law-based state, and tentatively embraces the natural-law concept of the rule of law, that is, the subjection of the state to a law that is superior to it, a law embodying universal moral principles to which every citizen may have recourse in the courts. It does not, however, give a clear indication of the source of that higher law in reason and conscience, that is, in human nature itself.[29] Nor does it invoke a historical tradition of legality. It says

nothing about achievements of the past except to refer in the Preamble to "the memory of our ancestors who through disasters and sufferings preserved and transmitted to us a bright faith in goodness and justice." No reference is made to the struggle for law waged in the past against heavy odds by individual Soviet citizens as well as by groups of citizens, or of previous law reform movements in the Soviet Union, or of the "good things" in previous Soviet constitutions.[30] The word "socialism" does not appear in the Draft. The drafters seem to have disregarded the injunction of the great nineteenth-century Russian religious philosopher Vladimir Soloviev that "in order to defeat what is false in socialism one must recognize what is true in it."[31]

It may be useful to compare briefly the 1990 Draft Constitution of the Russian Federation with another draft constitution, published simultaneously, called the Draft Constitution of the Russian Soviet Federation Socialist Republic (RSFSR), which was also intended to be submitted to the RSFSR Supreme Soviet and ultimately to the entire population of the Republic. The latter Draft was prepared by a group of deputies to the RSFSR Supreme Soviet who call themselves "Communists of Russia." The most striking difference between the two drafts is that the Russian Federation Draft makes no reference whatever to the USSR and, indeed, declares the exclusive authority of the Russian Federation over its entire territory, including the land, natural resources, air space and water, currency, foreign policy, defense, and similar matters. The RSFSR Draft, on the other hand, while declaring the sovereignty of the RSFSR throughout its territory, provides also that it is part of the Union of Soviet Socialist Republics, with the right freely to secede but also with participation in the armed forces and the military defense of the USSR and also, together with other republics, in various stated common tasks. One implication of such acceptance of membership in the USSR is that the RSFSR Constitution will be compatible with the constitutions of the other republics that comprise the USSR, and that the RSFSR conception of sovereignty, and of the relation of law to the state, will not be fundamentally inconsistent with that of the others.

The RSFSR Draft differs to a considerable extent from the Russian Federation Draft in style and language, but much less so in substance. Its Preamble declares that it "seeks to create a soviet socialist law-based state," and it refers to socialism at several other points, but the Preamble adds, after "law-based state," the words "a multiparty system based on principles of democracy, [and] an efficient economy based on various forms of ownership [and] on the development of market relations in the interests of securing the welfare of the people." The Preamble also defines "a democratic socialist order" as one characterized by "separation of the legislative, executive, and judicial powers."

Also the RSFSR Draft Constitution, like the Russian Federation Draft, proclaims a long list of "natural and inalienable rights" and contains a general declaration that "all rights and freedoms secured by the Constitution of the RSFSR shall be protected by the court." As in the Russian Federation Draft, the power to challenge the constitutionality of statutes and other normative acts is vested in a Constitutional Court, and if in a concrete case any court finds that a normative act which it is asked to apply contradicts the Constitution it must discontinue the proceeding and submit to the Constitutional Court a proposal to declare the act to be invalid.

Nevertheless, the provision of the Russian Federation Draft that "laws" (*zakony*) which do not correspond to "law" (*pravo*) are not valid is omitted, and various general limitations on citizens' rights are stated. Thus private enterprises are permitted, with individual or group ownership of means of production, but only "within the limits of [enacted] laws (zakony)." Also protection is provided against the use of individual or collective economic enterprises to exploit or otherwise cause disadvantage to other persons. In addition, there is a strong emphasis on the duties (and not only the rights) of citizens, and a great emphasis is placed upon social and economic rights.

In general, the RSFSR Draft is more traditionally Soviet in its language. The concept of a "civil society" is not introduced. Thus the impression of an effort to liberate society from domination by the state, which may be derived from the Russian Federation Draft, is much less apparent in the RSFSR Draft.

Yet the similarities between the two drafts are undoubtedly more significant from a jurisprudential viewpoint than the differences. They both represent a substantial implementation of the concept of the law-based state. Neither of them represents an introduction of the rule of law.

From the perspective of the rule of law, the strongest feature of both drafts is their reliance on the judiciary to supervise the constitutionality of statutes, decrees, and regulations of the legislative and executive or administrative branches of government. In the case of the Russian Federation Draft, this is to some extent strengthened by the inclusion of broad criteria of justice that are to guide constitutional interpretation and thus to enable the courts to make the letter of the Constitution conform to its spirit. This would give an opening to the development of judicial principles based on reason and conscience by which the will of the legislative branch and the practices of the executive branch could be restrained and educated.

On the other hand, natural law itself requires consistency and predictability in the judicial interpretation and application of constitutional principles; and here the enormous length and complexity and often contradictory tendencies of each of the drafts constitute serious drawbacks. These draft constitutions, like the existing 1977 Soviet Constitution, attempt to regulate the entire political, economic, and social life of the country. Like much of traditional Soviet legislation, they constitute a gigantic, all-embracing program.

In fact, from the perspective of Soviet history the heavy reliance on the judiciary to help carry out this program is also the weakest feature of both drafts, since the judiciary has been the weakest branch of the Soviet state. (I do not count the pre-Gorbachev Supreme Soviet, since prior to 1989 it was the apparatus of the Central Committee and the Politburo that constituted the de facto legislative branch.) Historically, one must go back to the pre-Soviet Russian judiciary and legal profession from the time of Alexander II's great reform of 1864 in order to find roots from which a competent, honest, and independent judicial branch could grow. This would suggest the need for a more cautious, step-by-step approach to Soviet constitutional reform.

In terms of an understanding of the relationship between the concept of the rule of law and the concept of a law-based state, Soviet experience teaches the inadequacy of both a positivist theory that identifies state and law with each other and of a natural-law theory that sets law above the state or in opposition to it. Both of these theories need to be integrated with each other and with historical jurisprudence.[32] The pravovoe gosudarstvo, or Rechtsstaat, is, to be sure, a great advance over both the absolute state and the policy state, in which the supreme political authority is considered to be above the law rather than being identified with it. On the other hand, since the law-based state remains the final source of the law with which it is identified, its commitment to law lacks the moral force that is invoked by the concept of a law that derives from the higher qualities of human nature itself, including, above all, human reason and human conscience. Yet the human sense of justice and fairness is itself an unruly guide. "Equity," John Selden complained in the seventeenth century, "is as long as the Chancellor's foot." An abstract legal morality may be as arbitrary in practice as the legislation enacted by the supreme political authority. Both of these sources of law need to be rooted in the historical experience and the social institutions of the people whose law it is.

Lacking in current Soviet legal thought, it would seem, is sufficient awareness that in the long run both legislation and equity, to be effective, must be adapted to and integrated with the customary law — the law-consciousness — of the peoples that comprise Soviet society. Indeed, from the point of view of historical jurisprudence one might argue — as the great founder of the historical school, Friedrich Carl von Savigny, argued in the early nineteenth century with respect to codification of the civil law of the German confederation — that in light of the lack of a sufficiently developed legal culture the time is not yet ripe in the Soviet Union for constitutional proclamations of the rule of law.

Notes

[1] The American periodical *Current Digest of the Soviet Press*, for example, habitually translates *pravovoe gosudarstvo* as "rule of law." William E. Butler, recognizing the distinction between "law-based state" and "rule of law," has chosen to use the phrase "rule-of-law state" because, as he writes, it "gives the benefit of the doubt to those who advocate the broader and more fundamental concept of law," that is, those who believe in a law that connotes "right and justice, consistency with moral principles that prevail always and everywhere, that may not be transgressed by citizen or state . . . ." William E. Butler, "The Rule of Law and the Legal System," in Stephen White, Alex Pravda, and Zvi Gitelman, editors, *Developments in Soviet Politics*, 1990, pp. 104-105. Many Soviet translators also prefer the broader translation. Other Soviet and English speaking translators use the more literal translation "law-based state" or "law-governed state" or "legal state." The same problem exists, of course, in the translation of Rechtsstaat.

[2] See H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983), *passim.*

[3] See *id.*, pp. 145-146.

[4] "His Majesty's Reasons Against the Pretended Jurisdiction of the High Court of Justice," reprinted in *A collection of scarce and valuable tracts on the most interesting and entertaining subjects*, London, 1748, series I, vol. IV, p. 169.

[5] Dicey's book went through eight editions from 1885 to 1915, during his lifetime, and two editions (1939 and 1959) after his death, edited with an introduction by E.C.S. Wade. The expression "natural justice," which is often used by English courts and writers, although not discussed by Dicey, has a meaning very close to his concept of the rule of law; it is not natural justice in the abstract but natural justice (or, as Americans would say, due process of law) as construed historically by the English courts in light of their precedents.

[6] See Dicey, *id.*, 10th ed., pp. 183-196.

[7] The doctrine of separation of powers is generally traced to Montesquieu's *L'esprit des lois* (1748). Mon-

tesquieu himself, in that work, mistakenly attributes the doctrine to the English Constitution. Cf. Livre XI, Chapitre VI, "De la constitution d'Angleterre."

[8] The French Constitution of 1791 states: "The legislative power cannot make any law that would infringe or impede the exercise of the natural rights recorded in the present chapter and guaranteed by the Constitution." Later constitutions (of which there were many) ceased to list natural rights. See the discussion in André Hauriou, Jean Gicquel, and Patrice Gélard, *Droit constitutionnel et institutions politiques*, 6th ed., 1975, pp. 195-197. At one point, the authors of this leading work, in a footnote, associate the constitutional movement in France in the late eighteenth and early nineteenth centuries with the transition from a policy-based state (*l'Etat de Police*) to a law-based state (*l'Etat de Droit*). *Id.*, p. 177, n. 9. They do not, however, use any expression that suggests the supremacy of law over the state. See infra notes 10, 11, 12.

[9] The 1791 Constitution declared that there is no authority in France superior to that of the *loi*, that is, the legislative enactment. This reflected the Enlightenment concept, expressly stated in the Massachusetts Constitution of 1780, of a "government of laws, not of men." This concept is often confused with the rule of law, to which it is, of course, related, but with which it is hardly identical.

[10] The term *Rechtsstaat* seems to have appeared first in 1829 in a work of Robert von Mohl. It is often traced, however, to Immanuel Kant, who advanced a similar concept without, apparently, using the term. Friedrich Darmstaedter, in *Die Grenzen der Wirksamkeit des Rechtsstaates* (1930), distinguishes between what he calls the "classical theory" of the Rechtsstaat, which goes back to the Middle Ages and which culminated in Kant's work, with the modern theory. See infra note 11.

[11] Otto von Gierke devotes the last chapter of his great work on Althusius to "the idea of the Rechtsstaat," tracing it back through Althusius to the twelfth century and treating it as a natural-law theory. O. v. Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien*, 6th ed., 1968, Chapter Six. This, however, is justified only if the term *Rechtsstaat* is given a broader meaning than that which it actually had when it was first used by von Mohl and others. Darmstaedter shows that throughout the nineteenth century Rechtsstaat presupposed a positivist jurisprudence which identifies law with the state and asserts the primacy of the state over the law. Op. cit., pp. 84 ff., 129 ff. Joseph LaPolombara, *Politics Within Nations* (1974), p. 106, makes the distinction very clear: "[T]he difference between the *Rechtsstaat* and constitutionalism is that the rule of law in the former is based on a concession from the rulers. The concession implies that the State has elected to engage in self-limitation in the exercise of power. But under constitutionalism the limitation is found to be a matter of right established by a combination of historical tradition and philosophical principle. While the distinction may sound legalistic, its impact is very real. It is like the contrast between an all-powerful father, who from time to time may refrain from tyrannizing over his children and even give them certain areas of freedom and independence to act, and a family where certain freedoms to act and take decisions are claimed and accepted as inherent in the family members."

[12] See Darmstaedter, *op.cit.*, p. 23 ff. The term *Polizeistaat*, which is applied to the German principalities in the sixteenth to eighteenth centuries, is often translated as "intervention state." It should certainly not be translated "police state."

[13] As is well known, German legal thought in the nineteenth century was dominated by the historical school, founded by Friedrich Carl von Savigny. In Russia, the movement to collect and codify the laws of the Empire in the nineteenth century was understood at the time less in terms of a positivist jurisprudence (such as was expounded by Jeremy Bentham) and more in terms of a historical jurisprudence, an evolving tradition of legality (such as was expounded by Savigny). This point is elaborated in H. J. Berman, "Some Jurisprudential Implications of the Codification of Soviet Law," Richard M. Buxbaum and Kathryn Hendley, eds., *The Soviet Sobranie of Laws: Problems of Codification and Non-Publication*, (1991), p. 173 ff.

[14] Walter Otto Weyrauch, Book Review, *Ius Commune*, vol. XVI, p. 569 (1989), refers at page 571 to a 1935 report of a German court to the Ministry of Justice concerning a case involving commitment of a person to a concentration camp for educational purposes, in which the court stated that a Rechtsstaat has not only the right but the duty, when the interest of the state, and especially state security, so requires, to recognize and carry out exceptional provisions." Similarly, a Soivet jurist, in discussing the concept of the supremacy of "laws" (as contrasted with the supremacy of "law"), stated recently that "it is enough to recall what kinds of laws were adopted in periods of mass repression." R. Z. Livshits, "Pravo i zakon v sotsialisticheskom pravovom gosudarstve," ~~["Pravo and Zakon in the Socialist Law-based State"]~~, *Sovetskoe gosudarstvo i pravo*, 1989, no. 3, p. 15 at p. 17.

[15] Cf. V. Kudriavtsev and E. Lukasheva, "Sotsialisticheskoe pravovoe gosudarstvo," *Kommunist*, no. 11 (1988), p. 44. Livshits, however, supra note 15, states that "the law-based state should be linked not with zakon (this is simply a self-restriction, and an inadequate one)

but with pravo, with society's concepts of justice [*spravedlivosti*]."

[16] One aspect of the illegality of many of the administrative regulations classified as "legislation" was their secrecy. That is, they were not published but instead circulated to agencies or officials directly affected by them. Cf. Buxbaum and Hendley, supra note 14. This practice has now been denounced as a violation of the law-based state, and it is argued that no unpublished regulation can have the force of law.

[17] Kudriavtsev and Lukasheva, supra note 14, p.45.

[18] *Id.*, p. 46.

[19] The authors do not, however, refer expressly to these traditional schools of jurisprudence. Moreover, they do not make any reference to the rich pre-revolutionary Russian heritage of jurisprudential writings on these subjects. In fact, various schools of thought concerning the nature of the law-based state were represented by pre-revolutionary Russian thinkers such as Chicherin, Soloviev, Petrazycki, Novgorodtsev, Kistiakovsky, Mikhailovsky, Hessen, and others. An excellent account of their writings is given in Andrzej Walicki, *Legal Philosophies of Russian Liberalism* (1987). Walicki states on page 1 "that the liberal intellectual tradition in pre-revolutionary Russia was in fact much stronger than is usually believed, that the main concern of Russia's liberal thinkers was the problem of the rule of law, and that the most precious legacy of Russian liberalism was precisely its contribution to the philosophy of law, as well as to the controversy about law, the debate in which the value of law as such was seen as . . . something in need of defence, and not something to be taken for granted." Since contemporary Soviet legal theorists are entirely familiar with this pre-revolutionary heritage, the failure of almost all of them to take it into account must be deliberate.

[20] "Kakim dolzhno byt' pravovoe gosudarstvo," *Literaturnaia gazeta*, 8 June 1988, p. 11.

[21] Prior to 1989 the 1977 Constitution empowered the Presidium of the Supreme Soviet of the USSR to exercise constitutional supervision over laws and decrees of all-union and republic supreme soviets and councils of ministers. The 1936 Constitution contained a similar provision. However, this power was almost never exercised during more than fifty years of its existence. A constitutional amendment of 1989 established a USSR Constitutional Supervision Committee to review the constitutionality of laws and decrees of the USSR Supreme Soviet and other bodies, though not of the newly established USSR Congress of People's Deputies. The Committee is not a court and does not decide concrete cases.

[22] James Kent, *Commentaries on American Law* (1826), 12th ed. by O. W. Holmes, Jr. (1873), vol. 1, p. 1. Kent starts his four-volume work with the statement: "When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe, as their public law." Kent implies, although he does not state expressly, that the law of nations is the source of the lawmaking power of the states that are subject to it.

[23] The Draft, entitled (in translation) "Draft: Constitution of the Russian Federation: Document published by decision of the Constitutional Commission of the RSFSR," was published in the newspaper *Sovetskaia Rossiia*, November 24, 1990, pp. 1-8. An alternative draft entitled (in translation) "Draft: Constitution of the Russian Soviet Federated Socialist Republics: Draft prepared by the initiative group of people's deputies of the RSFSR named Communists of Russia," was published in the same issue.

[24] The distinction between the two kinds of review is not easy to express in English. In German legal terminology the word *Verfassungsstreitigkeit* is used to refer to the power of a court to decide in the abstract, so to speak, that a certain law violates the constitution, and the term *richterliches Prüfungsrecht* is used to refer to the power of a court in a concrete case to refuse to apply a law because to apply it in that case would violate the constitution. See Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989), pp. 4-5. The latter power was asserted by Chief Justice Marshall in 1819 in Marbury v. Madison. The former power has been asserted by the United States Supreme Court in recent decades, although always in the context of concrete cases.

[25] The two great seventeenth-century proponents of the theory of the origin of the state in social contract — Hobbes and Locke — both contrasted "civil society" with a "state of nature," and identified it with the state. Cf. Hobbes, *Leviathan* (1681); Locke, *An Essay Concerning the True Original, End and Extent of Civil Government* (1689?). However, Locke's state, or "civil government," or "civil society," was a constitutional state, characterized by the rule of law, whereas Hobbes's state was a "Leviathan." Cf. John Keane, *Democracy and Civil Society* (1988), p. 35 ff. See also Keane, "Despotism and Democracy: The Origins and Development of the Distinction between Civil Society and the State 1750-1850," in John Keane, ed., *Civil Society and the State: New European Perspectives* (19—), p. 35 ff.

[26] See Eugen Rosenstock-Huessy, *Out of Revolution: The Autobiography of Western Man*, (1938), p. 416.

Rosenstock-Huessy explains the use of the word Kultur as a German answer to the French ideas of 1789 and more especially to the French gospel of a European civilization of free and equal brothers.

[27] See Gardels, "An Interview with Czeslaw Milosz," *New York Review of Books*, 27 February 1986, p. 34.

[28] This is one of the main themes of H. J. Berman, *Justice in the USSR*, (rev. ed. 1963). See pp. 275-282.

[29] The Draft uses the word "conscience" at one point, stating that "judges shall be independent and subject only to [statute] law (*zakon*) and to the voice of conscience." The draft immediately preceding the final draft had placed the word "their" before the word "conscience," suggesting a more subjective concept.

[30] See supra p. 12.

[31] The Draft does provide, however, in Article 1.8 that "the state shall operate on the principle of social democracy and [social] justice in the interest of the welfare of its citizens and of society," and shall "create conditions for proper living standards of all people," and that "the securing of equality of opportunities to each citizen of the Russian Federation shall be carried out by means of a developed system of state social services."

[32] Cf. H. J. Berman, "Toward an Integrative Jurisprudence: Politics, Morality, History," *California Law Review*, Vol. 6 (1988), pp. 779 ff.

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